

Service Date: December 18, 1997

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF the Application)	
of U S WEST Communications, Inc.)	UTILITY DIVISION
Pursuant to Section 252(e) of the)	
Telecommunications Act of 1996 for)	DOCKET NO. D97.7.135
Approval of its Interconnection)	
Agreement With Kevin Kerr, dba)	ORDER NO. 6021a
Montana TEL-NET.)	

ORDER ON RECONSIDERATION

Introduction and Background

1. U S WEST Communications, Inc. (U S WEST) entered into a negotiated interconnection agreement with Kevin Kerr, doing business as Montana TEL-NET (TEL-NET), setting the terms for TEL-NET's entry into the local exchange market in U S WEST's Montana exchanges. The Montana Public Service Commission (Commission) approved the parties' agreement, entitled "Interconnection Agreement Between U S WEST Communications, Inc. and Kevin Kerr Doing Business As Montana TEL-NET" (Agreement) on October 27, 1997 pursuant to § 252(e) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (February 1996) (the "1996 Act"). The Final Order approving the Agreement rejected certain portions of the agreement because they were not consistent with the public interest, convenience and necessity, discriminated against carriers who were not parties to the agreement, or were inconsistent with Montana law. The Order permitted the parties to file an amendment to the Agreement

within 14 days which could replace some of the rejected provisions with similar provisions addressing the Commission's concerns and the deficiencies identified in the Final Order of approval.

2. U S WEST filed a motion for an extension of time until November 19, 1997 in which to file an amendment to the Agreement; the Commission granted the motion on November 18, 1997. On November 19, 1997, US WEST filed an unsigned amendment to the agreement, a Request for Waiver of the 10-day period for requesting reconsideration in ARM 38.2.4504, and a Motion for Reconsideration of the Final Order. The Commission granted U S WEST's motions in a work session held on November 24, 1997.

Commission Decision

3. The Commission's rules, as noted in a footnote at the end of the Final Order, allow 10 days for filing a motion for reconsideration. The ability to grant a waiver of ARM 38.2.4806 during those 10 days is delegated to staff and routinely waived by staff upon timely request. The request was not timely made in this case. U S WEST's Request for Waiver asks the Commission to waive the procedural rule which allows 10 days in which to move for reconsideration. The Commission may waive any of its rules as good cause appears and as justice may require, unless precluded by statute. ARM 38.2.305.

4. U S WEST's stated reason for the request for a waiver is that it did not discover the need for reconsideration until it began preparing the compliance filing due November 19, 1997. U S WEST asserts the waiver would not prejudice any of the parties, would be in the public interest, and is not objectionable to Tel-Net.

5. We grant U S WEST's Request for Waiver and Motion for Reconsideration. For the reasons discussed below, the Commission concludes that it is appropriate to modify Order No. 6021 as requested by U S WEST.

6. U S WEST asks the Commission to reconsider Findings of Fact 15 and 16 in Order 6021. By these findings, provisions are rejected as being discriminatory to other carriers and as not being in the public interest, respectively. U S WEST asks that they be approved.

7. Section IV.C.2. provides in pertinent part:

. . . When USWC's end user or the end user's new service provider discontinues the end user's service in anticipation of moving to another service provider, USWC will render its closing bill to end user customer effective with the disconnection. . . . *USWC will not provide Reseller with the name of the other reseller or service provider selected by the end user.* (Emphasis added.)

Paragraph 16 of Order No. 6021 states that the italicized portion "is not appropriate where U S WEST has this information available to itself and is rejected as not being in the public interest."

8. U S WEST argues this should be reconsidered and found to be in the public interest because: (1) the identical provision is in the Interconnection Agreement between U S WEST and Max-Tel, approved by the Commission on May 7, 1997; (2) it is not only sound policy, but is required by controlling law; (3) the Commission has no basis for this finding rejecting the provision above because no hearing was conducted and no telecommunications carrier opposed any portion of the agreement in this Docket; and (4) Tel-Net does not object to the provision.

9. As to (1), the fact that the identical provision has previously been approved has no bearing on whether or not it can be rejected in a later contract. If there has been an oversight in approving a previous contract, it should not continue to be approved once it is discovered. This is not an appropriate basis by which to grant reconsideration.

10. Regarding (2), U S WEST's claim that the rejection is against controlling law: This claim is based on several assumptions on U S WEST's part, which are contested by other providers. First, it assumes that customer lists are proprietary information, in which case U S WEST cites 47 U.S.C. 222(a) which requires every telecommunications carrier to protect the confidentiality of proprietary information of other carriers, equipment manufacturers, and customers. Section 222 is entitled "Privacy of Customer Information" and its emphasis is on customer information. U S WEST also cites § 222(b), which states that a carrier that receives or obtains proprietary information from another carrier for purposes of providing service "shall use such information only for such purpose, and shall not use such information for its own marketing efforts." Thus, U S WEST states that it is precluded from using the information for its own purposes.

11. The other reasons--(3) and (4)--are somewhat related to each other. They argue that the Commission has no basis for this finding rejecting the provision above because no hearing was conducted and no telecommunications carrier (including Tel-Net) opposed any portion of the agreement in this Docket. The reason the Commission gave for rejecting the provision quoted above is that it is not in the public interest, not that it discriminated against other carriers. This contention--other carriers not opposing the provision--has little or no relation

to a decision to reject a contract term based on the public interest standard. Further, there is no reason to hold a hearing when there are no disputed factual issues to consider.

12. Although a legal determination of what is proprietary has not been made, U S WEST is bound by the provisions in 47 U.S.C. § 222(a) and (b) concerning proprietary information. This is a policy decision, and based on U S WEST's assertion that the customer information covered by § IV.C.2. is proprietary and this Commission's not having made a finding that it is or is not proprietary information, we conclude that it is in the public interest that this information not be given to other carriers. U S WEST may not use information it does not provide to other carriers for its own competitive marketing efforts.

13. We emphasize that § 222(b) permits U S WEST to use proprietary information it receives or obtains from another carrier for purposes of providing any telecommunications service only for purposes of providing such service, and not for its own marketing efforts. Therefore, any information that U S WEST claims is proprietary, until such time as it is determined otherwise, cannot be used by U S WEST except with relation to providing a change of the end user's choice of provider.

14. U S WEST also requests reconsideration of the Commission's decision to reject § IV.C.1., which includes the following sentence relating to Ordering and Maintenance:

Reseller's end users contacting USWC will be instructed to contact the Reseller; however, nothing in this Agreement, except as provided in Section IV.C.7(e), shall be deemed to prohibit USWC from discussing its products and services with Reseller's customers who call USWC for any reason.

Paragraph 15 discusses this provision:

. . . Although § IV.C.7(e) provides that U S WEST representatives will not discuss its products or services with TEL-NET's customers during the course of repair

calls or visits, this is the only limitation included in the Agreement. Such a provision may set the stage for anticompetitive conduct on the part of the dominant local exchange carrier. Further, it puts U S WEST in a position where it has an advantage in soliciting customers and this could discriminate against other telecommunications carriers who are not parties to the Agreement. This language should be stricken.

15. U S WEST argues ¶ 15 should be reconsidered and is not discriminatory because:

(1) the identical provision is in the Interconnection Agreement between U S WEST and Max-Tel, approved by the Commission on May 7, 1997; (2) the provision simply permits U S WEST to talk about its products if a TEL-NET customer calls U S WEST, except for a repair call and striking the provision means U S WEST cannot talk about its products to a TEL-NET customer who chooses to call U S WEST; (3) the Commission has no basis for this finding rejecting the provision above because no hearing was conducted and no telecommunications carrier opposed any portion of the agreement in this Docket; and (4) Tel-Net does not object to the provision.

16. Portions of our discussion above applies to this section as well. Specifically, it makes no difference whether or not Tel-Net or other carriers objected to the provision and it makes no difference whether or not it was approved in the Max-Tel agreement. The Commission may reject terms that appear to be anticompetitive and discriminatory according to both state and federal law. Furthermore, there are no facts to discern in a hearing. The Commission must make policy decisions that encourage competition and that further the purposes of both state and federal law.

17. Regarding (2), U S WEST's argument that it cannot talk about its products to a Tel-Net customer who chooses to call U S WEST, we grant reconsideration as explained below. Our rejection of this provision quoted above would have removed vague and perhaps overly

broad language from the contract. The only express restriction on U S WEST by the contract is in the course of repair calls. Nonetheless, we are persuaded by U S WEST's argument that the provision is not inconsistent with the requirements of § 252(e)(2)(A)(i).

18. U S WEST has pointed out that a Tel-Net customer could call U S WEST with the specific purpose of inquiring about U S WEST's products and U S WEST would be prohibited from discussing its products with that customer if this contract term is not included in the Agreement. We agree with U S WEST that striking the provision would prevent U S WEST from talking about its products to a Tel-Net customer who chooses to call U S WEST.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA. TEL-NET is a competitive local exchange carrier intending to provide regulated services in the State of Montana.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

3. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

4. The Commission may waive any of its rules as good cause appears and as justice may require, unless precluded by statute. ARM 38.2.305.

5. The Commission may abrogate, change, or modify its original order if it believes the original decision is in any respect unjust or unwarranted, or should be changed.

ARM 38.2.4806(3).

Order

THEREFORE, based upon the foregoing, it is ORDERED that

1. U S WEST's Request for Waiver and Motion for Reconsideration are granted,
2. Order No. 6021 is modified to strike ¶¶ 15 and 16 on pages 4-5, and
3. The parties shall file an amendment without delay evidencing the Commission's decision in Order No. 6021 and this Order.

DONE AND DATED this 10th day of December, 1997, by a vote of 4-1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)